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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-2791

PALLADIO, INC.,

Petitioner,

against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Preliminary Statement	4
Statement of the Case	5
Reasons for Granting the Writ	6
As to Question 1	9
As to Question 2	10
As to Question 3	6
As to Question 4	11
CONCLUSION	13
APPENDIX	
Opinion of the District Court for the Southern District of New York Dated November 25, 1970	A1
Opinion of the United States Court of Appeals for the Second Circuit, Dated March 26, 1971	A12
Judgment of the Court of Appeals for the Second Circuit Dated and Entered March 26, 1971	A15

PAGE

Public Law 91-135, 91st Congress, H. R. 11363, Dec. 5. 1969 (83 Stat. 275) (The Foreign Endangered Species Law) A16

New York's Laws 1970, Ch. 1048, Agricultural and Markets Law, Sec. 358-A (The Mason Act) A34

Cases Cited

Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928) 11

Florida Lime & Avocado Growers, Inc. v. Jacobson, 362 U. S. 73 (1960) 8

Hines v. Davidowitz, 312 U. S. 52 (1941) 10

Idlewild Bon Voyage Liquor Corporation v. Epstein, 370 U. S. 713 (1962) 8

Johnson, Jr. v. Haydel, 278 U. S. 16 (1928) 11

Michigan Public Utilities Comm. v. Duke, 266 U. S. 570 (1924) 8

Nettleton v. Diamond, 27 N. Y. 2d 182 (1970) 6, 7

Paul v. U. S., 371 U. S. 245 (1963) 8

Reptile Products Assn. v. Diamond —— U. S. —— (March 22, 1971) 4, 12

Toomer v. Witsell, 334 U. S. 385 (1948) 11

Zschernig v. Miller, 389 U. S. 429 (1968) 4, 10

Statutes Cited

PAGE

U. S. Constitution:

Art. I, §8, cl. 3 3

Art. II, §2 3

Art. VI, cl. 2 3

Art. XIV, §1 4

P. L. 91-135, 83 Stat. 275 .....2fn, 4, 6

Section 2 9

Section 3(a) 9

Section 5(a) 9

Section 5(b) 10

Section 5(c) 10

16 U. S. C. 667(e) 12

16 U. S. C. 668(aa) 12

18 U. S. C. 43 12

28 U. S. C. 1254(1) 2

28 U. S. C. 2281 4

Federal Register, Vol. 35, No. 106 6

New York's Agricultural & Markets Law, Sec. 358(a) (the Mason Act) 1–11

New York's Conservation Law, Sec. 187 ..... 2fn

Authorities Cited

Louisiana Wildlife and Fisheries Commission's News Release of January 21, 1971 ..... 5fn

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OCTOBER TERM, 1971

No. .....

PALLADIO, INC.,

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against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Second Circuit and that the Order entered in the above entitled action, dated the 26th day of March, 1971, be reviewed. The said Order affirmed the District Court's Order denying appellant's application for the appointment of a three judge court to consider the appellant's contention that New York Agricultural and Markets Law, Sec. 358 (a), (The Mason Act), is unconstitutional insofar as it prohibits all

commerce in every article made with the hide of any one of the 27 different species of Crocodylia (found only in foreign countries) although only 5 of the species are considered endangered. The Mason Act is reproduced at pp. A34-A35 below.*

Opinions Below

The Opinion below of the District Court has not been officially reported. The Opinion of the Court of Appeals, has not yet been officially reported. They are reproduced, respectively, at pp. A1 and A12 below.

Jurisdiction

Jurisdiction of this Court is conferred under United States Code Section 1254 (1) which confers jurisdiction to review any civil or criminal case in any of the Circuit Courts of Appeal. The said order of the Court of Appeals for the Second Circuit was entered on March 26, 1971. By order of this Court dated June 4th, 1971 (Mr. Justice John M. Harlan), petitioner's time to file a petition for writ of certiorari was extended to August 25, 1971.

Questions Presented

Does a proper concern for the ecology justify the summary denial of a citizen's documented petition for a hearing to prove the unconstitutionality of an extraordinarily drastic state law based upon premises substantially challenged under oath?

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* Although, in its complaint, petitioner also named the Harris Act, Laws 1970, Ch. 1047, Conservation Law, Sec. 187, it did not press the issue below and thus the Harris Act's validity is not before the Court. The Harris Act was enacted simultaneously with the Mason Act and is remotely similar to the Federal Foreign Endangered Species Conservation Act (P. L. 91-135, 83 Stat. 275).

Is not this appellant entitled to an opportunity to be heard by a 3 judge court to prove that the Mason Act is unconstitutional insofar as Crocodylia be concerned where it shows:

1. The Mason Act is a direct intrusion in the Federal Government's exclusive right to conduct foreign affairs, in violation of Article II, Cl. 2 of the Constitution,

2. The Mason Act represents an extension of the doctrine of a state's police power never before sustained, let alone considered in violation of Article I, Sec. 8, Cl. 3 of the Constitution.

3. The Mason Act's basic premises are spurious and it demonstrably is outrageously too broad, in violation of the 14th Amendment.

4. The Mason Act is in conflict with, and not supplementary to, the Federal (foreign) Endangered Species Conservation Act of 1969, in violation of Article 6, Cl. 2 of the Constitution.

Constitutional and Statutory Provisions Involved

The Constitutional and Statutory provisions involved are as follows:

"The Congress shall have the power to regulate commerce with foreign Nations and among the several states . . ." (Art. I, Sec. 8, Cl. 3).

"The Executive power shall be vested in a President of the United States of America. . . . He shall have Power, by and with the Advice and Consent of the Senate, to make treaties. . . ." (Art. II, Sec. 2).

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . .

shall be the Supreme Law of the Land . . .'' (Art. VI, Cl. 2).

''. . . No State shall make or enforce any law which shall . . . deprive any person of . . . property, without due process of law . . .'' (Art. XIV, Sec. 1).

The Statutory provisions herein are:

1. New York's Laws, 1970, Ch. 1048, Agricultural and Markets Law, Sec. 358-a. (The Mason Act) reproduced at pp. A34-A35.
2. The (Federal) Foreign Endangered Species Act of 1969 (P. L. 91-135, 83 Stat. 275) reproduced at pp. A16-A33.
3. 28 U. S. C. 2281.

Preliminary Statement

Although the Mason Act was previously before this Court (*Reptile Products Ass.* v. *Diamond,* —— U. S. ——, March 22, 1971), that case's record did not raise questions I and II above and was devoid of any material to support the others. A reading of the appellant's jurisdictional statement in the cited case reveals that its attack on the constitutionality of the Mason Act was focused on its contentions that the law violated the supremacy and the due process clauses without any material to support those contentions, let alone the overwhelming proof contained in the record at bar.

As the Court has said, in disposing of the supposed authority of an earlier case holding to the contrary:

> ''Had that case appeared in the posture of the present one, a different result would have obtained.'' (*Zschernig* v. *Miller,* 389 U. S. at p. 433.)

Statement of the Case

The petitioner, Palladio, Inc., is a Massachusetts corporation. A major share of its approximately $1,000,000 annual business is the marketing, especially in New York, of men's shoes, made with the skins of African crocodiles. None of the latter is of an endangered species. It instituted this action in the United States District Court for the Southern District of New York against the appropriate officials of the State of New York seeking, insofar as here material, a declaration that Sec. 358-a of the Agricultural and Markets Law (The Mason Act) was unconstitutional and an injunction against its enforcement. The Mason Act forbids the sale of any article made with the skin of anyone of the twenty-seven known species of Crocodylia *, although the Federal Government, after a 2½ year international study, found only 5 species and one sub-species to be endangered. None of the species at bar is indigenous to New York or to any other state of the Union.**

Concomitantly with the institution of the action, petitioner moved for an order appointing a three-judge Court and for a temporary injunction restraining the defendants-appellees (defendants hereinafter) from enforcing the said law. The District Court denied the motion in a decision dated November 25, 1970. The Court of Appeals for the Second Circuit unanimously affirmed on the 26th day of March, 1971.

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* Crocodylia for the purposes of this appeal encompasses crocodiles, caimans and gavial but not alligators.

** The American alligator and the Florida Crocodile, both of which are governed by laws not here questioned, are not included in this discussion. Incidentally, both have so increased their numbers that their commercial harvesting is either now actual or imminent (cf. Louisiana Wildlife and Fisheries Commission's News Release of January 21, 1971).

The District Court summarily rejected petitioner's contentions that the Mason Act was an improper interference with the Federal Government's exclusive treaty making powers, and that the said Act violated the Supremacy Clause. The District Court held that the Act was a valid exercise of the State's Police Power and that no question of fact existed as to the reasonableness of the said Act—despite the overwhelming evidence in the record that the relevant provisions of the Act are grossly unreasonable, clearly mandating the appointment of a three-judge court.

The material facts are discussed under the several points below.

Reasons for Granting the Writ

1. The Mason Act is unconstitutional because it is grossly too broad and "beyond the bounds of what is reasonable".

There are 27 major species of Crocodylia in the World. The Secretary of the Interior under the obligations imposed upon him by the Foreign Endangered Species Conservation Act of 1969 (Public Law 91-135, 83 Stat. 275), (Law hereinafter), after a two and one-half year study of the subject in conjunction with the representatives of 55 foreign governments and worldwide conservation groups, found 5 species and one sub-species of Crocodylia to be endangered. He, thereupon, barred their importation and sale in this country (Federal Register, Vol. 35, No. 106).

The plaintiffs in *Nettleton* v. *Diamond,* 27 N. Y. 2d, the state court action did not challenge the defendants' basic contention with respect to Crocodylia. The unchallenged contention formed the fulcrum of New York's

Court of Appeals majority decision and is best summarized in the opinion of the majority of the Court, at 27 N. Y. 2nd, at p. 196:

> "All the listed animals need protection because they are endangered, *or, in the case of crocodiles because processed skins of endangered animals for all practical purposes are indistinguishable from those in abundant supply.*" (Emphasis supplied.)

That contention is completely erroneous.

The record herein, contradistinguished from the record in *Nettleton* v. *Diamond* (*supra*), contains overwhelming proof that the skins of the different species and of the sub-species are distinguishable. Their distinguishability can be readily gathered from one of the many undisputed facts in the record at bar, viz., the prices of the skins of the different species and sub-species vary from a low of $2.00 a square foot to a high of $6.00 a linear inch. Surely, every one using Crocodylia skins in his business must be able to distinguish the skins, both in their raw state and in their finished state.

Another unchallenged fact in this record is that the skins of the endangered species are of no commercial significance; no prices are quoted for them.

It thus appears that the Mason Act prohibits all commerce in approximately 22 species of Crocodylia which the State Court of Appeals found to be "in abundant supply", without rhyme or reason. Not only is the Mason Act without rhyme or reason but, as the record herein discloses, its enforcement poses a serious threat to the ecology, the lives of the natives of the foreign countries in which these saurians are abundant and to their livestock, to say nothing of the incalculable harm inflicted upon the American business man and his employees.

The District Court accepted another contention advanced by the defendants, namely, that the leather industry historically exterminated one species of Crocodylia after another, citing as examples of such successive exterminations, the Nile crocodile and Morelet's crocodiles.

That contention is, similarly, completely erroneous.

Petitioner's proof below established that one Morelet, a Frenchman identified this species in 1841 but no further example of the species had been seen for the next seventy-two years, until an expedition from the Chicago Natural History Museum found a few specimens in British Honduras.

Petitioner's proof below also pointed out that Ethiopia, a principal source for the Nile crocodile had been forced to open up its borders to the harvesting thereof because the species had so drastically increased its numbers that it posed a serious threat to the lives of residents of that country and their livestock.

Obviously no one had ever exterminated Morelet's crocodile and, manifestly, no one had ever exterminated the Nile crocodile.

It is respectfully suggested that upon this state of the record it would appear that the Mason Act is unconstitutional in that its provisions are "beyond the bounds of what is reasonable" (*Michigan Public Utilities Comm.* v. *Duke*, 266 U. S. at p. 577, mandating the appointment of the three-judge court. *Florida Lime & Avocado Growers* v. *Jacobson*, 362 U. S. 73; *Paul* v. *United States*, 371 U. S. 245; *Idlewild Liquor Corp.* v. *Epstein*, 370 U. S. 713.

It is respectfully suggested that so ancient and honorable a trade as the leather trade is entitled to the same right to a three-judge court to prove the invalidity of a state law prohibiting commerce in the skins of Crocodylia

"in abundant supply" as was afforded the Avocado industry, the milk business and the liquor business, in the cases cited, respectively, above.

2. The Mason Act is unconstitutional because it is a direct intrusion in the Federal Government's exclusive right to conduct foreign relations.

Any fair reading of the Law * establishes that it constitutes the basis of the Federal Government's relationships with foreign governments concerning the protection of Fish and Wildlife, indigenous to the foreign countries.

Thus, Sec. 2, confines the ambit of the Act to "*imports of any foreign country*".

Section 3. (a) provides:

> "Sec. 3. (a) A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction *whenever the Secretary determines, . . . in cooperation with the Secretary of State, with the foreign country or countries in which such fish or wildlife are normally found . . .* that the continued existence of such species or subspecies of fish or wildlife is, in the judgment of the Secretary, . . ."

Sec. 5. (a) Directs the Secretary of the Interior, "through the Secretary of State . . . to encourage foreign countries to provide protection to species of . . . wildlife threatened with world-wide extinction, and (to) cooperate with such countries in providing technical assistance" and "shall *through the Secretary of State, encourage bilateral and multi-lateral agreements with such countries for* the protection, conservation and propagation of such wildlife".

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* Reproduced at pp. A16-A33 below.

Sec. 5. (b) provides:

> "(b) To assure the worldwide conservation of endangered species and to prevent competitive harm to affected United States industries, the Secretary, through the *Secretary of State, shall seek the convening of an international ministerial meeting* on fish and wildlife prior to June 30, 1971, and included in the business of that meeting shall be the signing of a *binding international convention on the conservation of endangered species.*"

Sec. 5. (c) provides:

> "(c) *There are authorized to be appropriated such sums, not to exceed $200,000,* as may be necessary *to carry out the provisions of subsection (b)* of this section, such sums to remain available until expended." (Emphasis added.)

It may be forcefully urged that the Mason Act constitutes a far more direct intrusion in the Nation's ability to conduct foreign relations than this Court has condemned. *Zschernig* v. *Miller* (1968), 389 U. S. 429; *Hines* v. *Davidowitz* (1941), 312 U. S. 52.

The Mason Act's intrusion into the field of foreign affairs is more than an academic concept. The Record below contains vigorous written protests against the Mason Act by the Government of the State of Amazonas, Republic of Brazil.

We respectfully suggest that the Record below contains sufficient material on this score to mandate the appointment of a 3 judge court.

3. The Mason Act is an extension of the Police Power greater than has ever been even considered in the history of this country.

It bears emphasis that no species of Crocodylia is now or ever has been indigenous to the State of New York. Despite all reasonable diligence on the part of both the petitioner and the defendants, no case has been unearthed even dealing with the state's right to prohibit commerce in a species of wildlife not indigenous to that state. Not only has no such case been found but, on the contrary, this Court has repeatedly rejected the argument that a state Police Power authorizes a state statute to affect interstate commerce in migratory wildlife, even though the statute obviously applied to such wildlife only while found within the territorial jurisdiction of the state. *Toomer* v. *Witsell* (1948), 334 U. S. 385; *Foster-Fountain Packing Co.* v. *Haydel* (1928), 278 U. S. 1; *Johnson, Jr.* v. *Haydel* (1928), 278 U. S. 16.

The upholding of The Mason Act, therefore, is revealed as an extension of a state's Police Power far beyond the limits condemned by repeated decisions of this Court. The consequences flowing from the validation of such an enormous extension of a state's Police Power are incalculable. For example, permitting a state to prohibit all commerce in foreign wildlife, not indigenous to that state, and in derogation of an immensely detailed Federal Act which is impregnated with this country's dealings with foreign countries, obviously could only result in a gross change in the historical and constitutional relationship between the state and the Federal Government.

We suggest that upon this ground alone, the validity of the Mason Act is sufficiently questionable to mandate the appointment of a three-judge court.

4. The Mason Act violates the Supremacy Clause. A reading of the Federal Law clearly connotes the Congress'

intent that the Law has preempted the field. We suggest that a law, as immensely detailed as this one and impregnated with this country's relations with foreign countries, precludes any action in the field by a state. The lower court's reliance upon other sections of federal law, viz., P. L. 9136, is misplaced.

For example, 16 U. S. C. 667-e refers to "game animals or game or song birds." We need hardly belabor the concept that the crocodile has never been classified as a game animal. It also appears clear that Section 7(a) (2) of the Law does not support the lower court's conclusion that a state may impose restrictions, not contained in the law itself, upon traffic in foreign wildlife. It would appear clear that the point of Sec. 7(a)(2) is directed to a state's or to a foreign country's law controlling or prohibiting commerce in wildlife indigenous to that state or country. To read a different interpretation into a subsection of a law which is merely a modification of the Transportation Law (18 U. S. C. A. 43), would create an exception to the whole thrust of the law itself, concerned as it is solely with "the protection, conservation and propagation of wildlife" found only in foreign countries. This view is corroborated, we suggest by the domestic Endangered Species Act of 1967 (16 U. S. C. A. 668aa) which confines itself to "native species of fish and wildlife" (Sec. a).

It is respectfully suggested that while the petition in *Reptile Products Assn. Inc.* v. *Diamond,* (*supra*), raised the question of supremacy, no direct reference was therein contained to the provisions of the law. Once again, a question has been presented to the Court below which mandated the appointment of a three-judge court.

Conclusion

This Petition presents substantial questions of Federal Law which, in part, have never been decided by this Court, and in other parts, which, apparently, had been decided contrary to determinations of this Court. Probable jurisdiction should be noted, with briefs on the merits and oral arguments further ordered.

Respectfully submitted,

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Opinion of United States District Court, Southern District of New York

MANSFIELD, D.J.

It is now generally recognized that the destruction or disturbance of vital life cycles or of the balance of a species of wildlife, even though initiated in one part of the world, may have a profound effect upon the health and welfare of people in other distant parts. We have come to appreciate the interdependence of different forms of life. We realize that by killing certain species in one area we may sound our own death knell.

For these reasons ecology has become everyone's business. Like pollution it does not cease to be of vital concern merely because the problem is created at a distant point. These principles are here challenged, at least insofar as they are invoked as a basis for state laws prohibiting the sale of crocodile skins in New York.

Plaintiff, a Massachusetts corporation, has brought this action against various officials of the State of New York in charge of administering and enforcing its newly-enacted Harris Law,[1] and the Mason Law,[2] charging that the Mason Law violates the Federal Constitution and that enforcement of the Harris Law in accordance with the provisions of the Mason Law is also unconstitutional to the extent that both laws prevent plaintiff from offering for sale and selling men's shoes made with the skins of species of Alligators, Caimans or Crocodiles of the Order Croco-

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[1] Ch. 1047, of the Laws of 1970 (enacted by the State of New York on May 20, 1970) added §187 to the State's Conservation Law, to be effective September 1, 1970.

[2] Ch. 1048, of the Laws of 1970 (also enacted May 20, 1970), added §358-a to the State's Agriculture and Markets Law, to be effective September 1, 1970.

dylia which are not listed on the Endangered Species List promulgated by the Secretary of the Interior of the United States.

In *A. E. Nettleton Company* v. *Diamond*, — N. Y. 2d — (October 15, 1970), the New York Court of Appeals upheld, under both state and federal grounds, the constitutionality of the laws attacked here today. Plaintiff was not represented in that suit. It argues that New York's highest court was in error, and seeks a temporary injunction against the enforcement of these acts as applied to the importation of Crocodylia skins and the appointment of a three-judge court. For the reasons stated below plaintiff's motion is denied; it has not raised a substantial federal question.

The Harris bill, n.1, *supra*, provides that the protection of endangered species of wildlife is a matter of general state concern, and that the states must assume their responsibility. §1, Section 2 of the Act amends the state Conservation Law by prohibiting the importation, sale, or possession with intent to sell, of any article made from the skin of any endangered species. An "endangered" species is one designated by the New York Department of Environmental Conservation, by order filed with the Secretary of State.

The Mason bill, n.2, *supra*, is much more explicit and restrictive, providing in pertinent part:

> "§358-a. *Sale of certain wild animals or wild animal products prohibited*
>
> "1. *No part of the skin* or body . . . of the following species of wild animals . . . *may be sold* or offered for sale by any individual . . . after the effective date of this section:— . . . . *Alligators,*

Caiman or Crocodile of the Order Crocodylia. . . ." (Emphasis added)

Concededly the Mason bill damages plaintiff's business operation, which is the importation of shoes from Europe. Most of these shoes are made from the skins of Alligator, Caiman or Crocodiles of the Order Crocodylia (i.e., alligator shoes). Last year plaintiff sold almost $6 million worth of alligator shoes, and at least 40% of these sales were to New York retailers.

Prior to New York's enactment of these laws, the Federal Government had in December, 1969, enacted the Endangered Species Conservation Act of 1969, P.L. 91-135, codified in part in 16 U. S. C. A. §66Baa, *et seq.* (Supp. March, 1970), to deal with the serious problem of the rapid decimation and extinction of various species of animals. This Act forbids importation of species found by the Secretary of the Interior to be "threatened with world wide extinction," 16 U. S. C. A. §668cc-2 (Supp. March, 1970), as well as interstate transportation of wildlife taken in violation of national, state or foreign laws. 18 U. S. C. A. §43(a)(2) (Supp. March, 1970). Pursuant to the Act the Secretary of the Interior, after notice and an opportunity to be heard, prepared an "endangered species list" and prohibited the importation into the United States of articles made with the skins of mammals, birds, amphibians, reptiles, and fish threatened with extinction by publishing the names of the species in the Federal Register. See 50 C. F. R. §§17.10, 17.11, in 35 Fed. Reg. 8493 (June 2, 1970). The Secretary's current regulations presently list only one species of foreign Crocodylia, Caiman Yacare, the importation of which is barred. He has rescinded the designation of several other foreign species of Crocodylia because adequate note as to those species

had not been given. Compare 35 Fed. Reg. 8491, 8497 App. A (June 2, 1970), with 35 Fed. Reg. 12121-23 (July 29, 1970).

Plaintiff has no quarrel with the federal law and its regulations. It strongly objects, however, to the new state laws which amplify and are much stricter than the federal law.

First, plaintiff argues that there were no hearings on the Mason Law (which in effect explicitly forbids the importation of alligator shoes). The New York Court of Appeals' opinion, slip sheet at 10, stated:

> "The minutes of a hearing held prior to the enactment of the *Mason Law* reveal that the Legislature specifically considered whether the Tiger Vicuna, Red Wolf, Polar Bear, Mountain Lion, Jaguar, Ocelot, Margay, Leopard, Cheetah and *Crocodile* are subjects of commercial exploitation and are threatened. Thus, it appears that the Legislature rejected the Industry's assumption and found otherwise. Accordingly, we do not have the power to disturb these findings." (Emphasis added.)

Plaintiff states that the court was in error: "The only hearings the Legislature conducted," says the affidavit of Mr. David Klapisch, Chairman of the Reptile Products Association, "were in connection with the Harris Act. Since the Harris Act was patterned upon the Federal Foreign Endangered Species Conservation Act, which the industry supports, there was no objection voiced by the industry thereto." Aff. at p. 5.

Rather than decide whether the Legislature had hearings on the Mason Act, we will assume for present pur-

poses that plaintiff is correct.[3] The answer is that since there *were* legislative hearings on the Harris Act, the legislature was justified in using its findings on one bill to support another bill dealing with the same subject matter, albeit in a stronger manner. Moreover, there is no constitutional requirement that the legislature conduct hearings and build a record when it passes a law. E.g., *Bi-Matallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441 (1915) (Holmes, J.). As Professor Cox has noted in his *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966) (footnotes omitted):

> "[A] statute must be judged constitutional if any set of facts which can reasonably be conceived would sustain it. No case has ever held that a [legislative] record is constitutionally required. [This view] is also supported by the cases upholding con-

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[3] Whether or not there were hearings on this act is a matter in dispute. Plaintiff argues in its Supplemental Memorandum at 3:

> "The defendants have not disputed that there were neither legislative hearings conducted in connection with the Mason Law nor legislative findings relating thereto."

However, the Defendants' Memorandum of Law, which was filed well before Plaintiff's Reply Memorandum, explicitly states, at p. 4:

> "Agriculture and Markets Law §358-a, enacted by L. 1970, ch. 1048 (the Mason Law) enumerates several species found by the Legislature to be threatened with extinction, including the leopard, tiger, and 'alligators, caiman or crocodile of the order crocodylia,' and forbids the sale or offer for sale within this State of any 'part of the skin or body, whether raw or manufactured,' of those species. *These legislative findings were based on the testimony of distinguished biologists elicited* at legislative hearings." (Emphasis added.)

> gressional legislation under the commerce clause prior to the nineteen-thirties, much of which apparently rested upon factual conclusions for which no legislative record could be cited. The principle is not merely one of deference to Congress or the states. It rests upon appreciation of the fact that the fundamental basis for legislative action is the knowledge, experience, and judgment of the people's representatives, only a small part, or even none, of which may come from the hearings and reports of committees or debates upon the floor."

Plaintiff next contends that the only endangered species are those found to be endangered by the United States Secretary of Interior; that the New York legislature could not have reasonably made findings different from the federal findings; that one can distinguish between these species and non-endangered species; and that New York's complete prohibition is, therefore, unreasonably overbroad.

Plaintiff has presented no convincing proof that the first part of its argument may be correct. Nowhere does the Secretary of Interior indicate that his list of endangered species is definitive. The state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection. We cannot overrule the legislature for being cautious. Extinct animals, like lost time, can never be brought back. They are gone forever. Since 1600 A. D. the world has destroyed for all time 130 animal species and 288 subspecies. F. Wayne King, Curator of Herpetology for the New York Zoological Society and a member of the International Crocodile Society and the American Alligator Council, supports this view in his

affidavit (at pp. 4-5), which was before the New York Court of Appeals:

> "The fact is that today a number of species of crocodilians are in danger of extinction, and virtually every species is declining in numbers. In every case the threat to their continued survival comes principally from hide-hunters slaughtering the animals at a rate faster than they can reproduce, coupled with the killing of the large breeding adults. Nowhere is hide-hunting practiced on a sustained-yield basis, taking only the surplus animals and leaving a breeding population intact. The alligator population in South Florida has declined 30% in numbers due to poaching in the period 1954-1958 alone. The same rapid dwindling is occurring in the African and South American habitats of crocodiles and caimans. Even where taking is unlawful, the economic incentives for poaching are powerful, and only legislation eliminating the market can possibly halt the extinction of the alligator, caiman and crocodile."

Plaintiff cites as proof of the definitiveness of the federal study the fact that the Secretary promulgated his lists only after investigating the status of wildlife through the world for upwards of two and one-half years, and after consultation with scientists, conservation groups, and government officials of at least 55 foreign countries. We disagree. The fact that the Secretary of Interior had to conduct such an extensive study shows that the determination of what species are endangered is not an easy one. We cannot override the legislature because it came to a conclusion different from the Secretary of Interior. If the experts disagree—and apparently they do, see *A. E. Nettleton Co.* v. *Diamond*, Ct. App. (Oct. 16, 1970), slip

sheet opinion at 10-11—the legislature has the right to accept one line of authorities rather than another.

The New York Court of Appeals stated, slip sheet opinion at 12:

> "All the listed animals [in the Mason Law] need protection either because they are endangered, or in the case of crocodiles, because processed skins of endangered animals for all practical purposes are indistinguishable from those in abundant supply."

Plaintiff argues that the state court was simply mistaken, and it is possible to distinguish between the federally listed endangered species and other species.

The state court relied on the authority of Dr. F. Wayne King, but plaintiff says that Dr. King has since then "vastly retracted that claim" (Aff. of David Klapisch, Chairman of the Reptile Products Assn., at 3), and that "*persons engaged in the trade*" can distinguish the processed skins of different species. *Id.* at 3-4 (emphasis added). In rebuttal Dr. King labels Mr. Klapisch's claim as "patently false" and states that while it is probably possible to distinguish one general group of alligators from another, *within these groups* it is very difficult to distinguish. Thus the common caiman has four subspecies and only one of these, the Caiman Crocodilus Yacare, is on the federal endangered list, but it is difficult to distinguish this one from the others on the basis of tanned hides. (Aff. of Dr. King, Oct. 28, 1970, at 2).

The New York legislature could reasonbly have taken the view espoused by Dr. King. But even accepting plaintiff's contention it was appropriate for the legislature to protect all Crocodylia in order to prevent successive exterminations of various species. For example the affidavit of Herndon Dowling, research associate in the Department

of Herpetology of the American Museum of Natural History, tells us that the best type of crocodilian leather has been alligator hide. But the American alligator (*Alligator Mississippienses*), "despite . . . the greatest attempts at conservation of any crocodilian, is nevertheless on the verge of extinction." In the last decade 99% of these alligators outside of National Parks were killed. After virtual elimination of the domestic supply, the industry exploited the foreign, more exotic species, such as the Nile crocodile[4] (referred to in plaintiff's affidavit) and the Morelet's crocodile.

Now apparently the killers are moving to the Caiman skins. "Crocodilians of this genus were spared the main pressure of hide hunters until the mid-1960's because they are relatively small (8 to 12 feet) and have bone in the belly-skin, making for more difficult processing and less valuable leather. Thus the commercial taking and use of caiman is not due to concern for conservation but rather to the fact that more profitable species such as alligator are no longer available." Mr. Dowling ominously concludes: "The persistent, recurring pattern is that whenever a wild species becomes important to the leather industry, it becomes threatened with extinction."

Next plaintiff argues that New York may not constitutionally interdict interstate commerce where the sole purpose of the statute is aesthetic. The legal validity of the proposition is questionable. See, e.g., *Barrett* v. *New York*, 220 N. Y. 423, 428 (1917) ("The eagle is preserved, not for its use but for its beauty"). However, it is unnecessary to test it for the reason that there is ample evidence of vital non-aesthetic interest on the part of the

[4] This crocodile was once so numerous that it was said that the dogs would drink at the Nile running along, so that they would not be seized by the crocodile. Pliny, Natural History, Book 8, §148.

state which justify its exercise of its broad police powers to discourage the extinction of foreign Crocodylia. Mr. William Conway, General Director of the New York Zoological Society, testified:

> "It is the world, and not merely the natives of the countries in which a species of animal happens to be found, which suffers when that species dies out. . . . In the case of species in commercial use, extinction means a permanent diminishing of the opportunities for livelihood . . . of workers in New York States who process pelts. Protection of the animals now can give them time to repopulate. . . . Whatever immediate difficulties the Mason Law may impose are likely to be temporary. If the animals are permitted now to be over-exploited and become extinct the difficulties will be permanent." (Aff. at 4-5).

Plaintiff's argument, that the Mason Law should be struck down because it is preempted by the exclusive system of regulation established by federal law, was adequately considered and discussed by the New York Court of Appeals, which properly rejected it. There is no inconsistency or conflict between the recently enacted federal Endangered Species Conservation Act of 1969, P. L. 91-135, 16 U. S. C. A. §668aa, *et seq.* (Supp. March 1970), and the Mason Act. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142 (1963). Moreover, this federal law and the regulations promulgated under it explicitly recognize the role of the states. Section 7(a)(2) of P.L. 9-136 provides that the importation of wildlife in violation of state law (as well as the law of any foreign country) is subject to certain penalties. See also, 50 C. F. R. §17.16, 35 Fed. Reg. 8495 (June 2, 1970). We

likewise find no merit in plaintiff's contention that the Mason Law interferes with Congress' power to regulate commerce and to make treaties, with federal control over foreign affairs, and with the supremacy clause of the Constitution. On the contrary the Endangered Species Act invites state action.

Equally baseless is the argument that the Mason Act and Harris Law deprive plaintiff of property without due process because plaintiff will lose money. Plaintiff has no property right in the wildlife of foreign countries, and the mere loss of profits is not a basis for declaring the state laws unconstitutional, cf. *Nebbia* v. *New York*, 291 U. S. 502, 523 (1934).

Plaintiff's other arguments are not worthy of discussion. Most of them are of the type that would more properly be presented to the legislature. See, e.g., the Kapisch affidavit at 6, to the effect that the Mason Law will reduce the price for the skins of crocodylia and that natives will kill *more* crocodylia in order to achieve their former cash income (which contradicts other evidence of plaintiff, e.g., letter of the Governor of the State of Amazonas, Brazil, complaining that the Mason Law will result in *less* crocodylia being killed).

Since plaintiff has presented us with no substantial federal question, its motion for a preliminary injunction and three-judge court are denied.

The above shall constitute the court's findings of fact and conclusions of law in acordance with Rule 52(a), F. R. C. P.

It is so ordered.

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U. S. D. J.

Dated: November 25, 1970.

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 682—September Term, 1970.

(Argued March 26, 1971 Decided March 26, 1971.)

Docket No. 35686

PALLADIO INC.,

Plaintiff-Appellant,

v.

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Comissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of The City of New York,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*

KAUFMAN and HAYS, *Circuit Judges.*

Appeal from an order entered in the United States District Court for the Southern District of New York, Walter R. Mansfield, *Judge,* denying an application for a preliminary injunction and the convening of a three-judge

court to declare unconstitutional §358-a of the Agriculture and Markets Law of the State of New York.

JOSEPH L. FORSCHER (David S. Glassman, Steven Elias, Glassman & Elias, New York, N. Y., on the brief), *for plaintiff-appellant.*

THOMAS F. HARRISON, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, of counsel; Samuel A. Hirshowitz, First Assistant Attorney General, Philip Weinberg, Assistant Attorney General, on the brief), *for defendants-appellees.*

PER CURIAM:

We affirmed in open court the order of the district court declining to issue a preliminary injunction or to convene a three-judge court to consider the constitutionality of New York State's recently enacted Mason Act, codified as §358-a of the Agriculture and Markets Law. A companion measure to the somewhat milder (from plaintiff's viewpoint) Harris Act, codified as §187 of the New York Conservation Law, the Mason Act is designed to discourage the killing for profit of several named species of animals which the legislature apparently concluded were in danger of becoming extinct or might become so unless remedial measures were taken. To the end that "the potential for their continued existence will be strengthened" (Harris Act, Section 1), the Mason Act prohibits the sale or offer for sale within the State of products made from the skins of those animals, including leopards, tigers, cheetahs, red wolves, polar bears, and "alligators, caiman or crocodile of the order crocodylia." Plaintiff is a Massachusetts

corporation which designs and sells men's shoes, most fashioned from the skins of African crocodiles. As approximately 40% of plaintiff's business was with New York retailers in the most recent fiscal year, it stands to suffer considerable economic injury as a result of the Mason Law.

Palladio has raised a variety of constitutional objections to the Mason Act, but among these the most prominent is the assertion that most of the species of crocodiles—and all of those in which Palladio deals—are in plentiful supply and in no danger of extinction, at least not today. Palladio argues that the New York legislature's decision to outlaw the sale of all kinds of crocodiles was irrational and that consequently the Mason Act deprives it of property without due process of law. Palladio also attacks the law under the Commerce and Supremacy Clauses of the Constitution, and as inconsistent with recent federal legislation in this area. The reasons that each of these attacks falls short of raising a Constitutional question sufficient to warrant the convening of a three-judge court are well stated in Judge Mansfield's opinion below, reported at —— F. Supp. ——, and we have nothing to add to his discussion. Moreover, in *Reptile Products Assn., Inc.* v. *A. E. Nettleton*, 39 U.S.L.W. 3409 (March 23, 1971), the Supreme Court dismissed an appeal from a ruling of the New York Court of Appeals, 27 N.Y.2d 182 (1970), which had found the Mason Act invulnerable to virtually the same attacks as plaintiff presses here.

Judgment of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of March one thousand nine hundred and seventy-one.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

PALLADIO, INC.,
Plaintiff-Appellant,

v.

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, HOWARD R. LEARY, as Police Commissioner of the City of New York,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

Public Law 91-135, 91st Congress, H. R. 11363, December 5, 1969

AN ACT

83 Stat. 275

To prevent the importation of endangered species of fish or wildlife into the United States; to prevent the interstate shipment of reptiles, amphibians, and other wildlife taken contrary to State law; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purposes of sections 2 through 5 of this Act, the term—

(1) "Secretary" means the Secretary of the Interior;

(2) "fish or wildlife" means any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean, or any part, products, egg, or offspring thereof, or the dead body or parts thereof;

(3) "United States" includes the several States, the District of Columbia, the Commonwealth of

Puerto Rico, American Samoa, the Virgin Islands, and Guam; and

(4) "person" means any individual, firm, corporation, association, or partnership.

SEC. 2. Except as provided in section 3 of this Act, whoever imports from any foreign country into the United States any species or subspecies of fish or wildlife which the Secretary has determined, in accordance with the provisions of section 3 of this Act, to be threatened with worldwide extinction, shall be punished in accordance with the provisions of section 4 of this Act.

SEC. 3 (a) A species or subspecies of fish or wildlife shall be deemed to be threatened with worldwide extinction whenever the Secretary determines, based on the best scientific and commercial data available to him and after consultation, in cooperation with the Secretary of State, with the foreign country or countries in which such fish or wildlife are normally found and, to the extent practicable, with interested persons and organizations and other interested Federal agencies, that the continued existence of such species or subspecies of fish or wildlife is, in the judgment of the Secretary, endangered due to any of the following factors: (1) the destruction, drastic modification, or severe curtailment, or the threatened destruction, drastic modification, or severe curtailment, of its habitat, or (2) its overutilization for commercial or sporting purposes, or (3) the effect on it of disease or predation, or (4) other natural or man-made factors affecting its continued existence. After making such determination, the Secretary shall promulgate and from time to time he may revise, by regulation, a list in the Federal Register of such fish or wildlife by scientific, common, and commercial name or names, together with his determination. The Secretary shall at least once every five years

conduct a thorough review of any such list to determine what, if any, changes have occurred relative to the continued existence of the species or subspecies of fish or wildlife then on the list and to determine whether such fish or wildlife continue to be threatened with worldwide extinction. Upon completion of such review, he shall take appropriate action consistent with the purposes of this Act. The Secretary shall, upon the request of any interested person, also conduct such review of any particular listed species or subspecies at any other time if he finds and publishes his finding that such person has presented substantial evidence to warrant such a review.

(b) In order to minimize undue economic hardship to any person importing any species or subspecies of fish or wildlife which are determined to be threatened with worldwide extinction under this section, under any contract entered into prior to the date of publication of such determination in the Federal Register of such species or subspecies, the Secretary, upon such person filing an application with him and upon filing such information as the Secretary may require showing, to his satisfaction, such hardship, shall permit such person to import such species or subspecies in such quantities and for such periods, not to exceed one year, as he determines to be appropriate.

(c) The Secretary may permit, under such terms and conditions as he may prescribe, the importation of any species or subspecies of fish or wildlife listed in the Federal Register under this section for zoological, educational, and scientific purposes, and for the propagation of such fish or wildlife in captivity for preservation purposes, unless such importation is prohibited by any other Federal law or regulation.

(d) The provisions of section 553 of title 5 of the United States Code shall apply to any regulation issued under this section.

SEC. 4. (a)(1) Any person who violates any provision of sections 2 or 3 of this Act or any regulation or permit issued thereunder, or any regulation issued under subsection (d) of this section, other than a violation the penalty for which is prescribed by subsection (b) of this section, shall be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed under this paragraph, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo.

(2) Any employee authorized pursuant to subsection (c) of this section to enforce the provisions of sections 2 and 3 of this Act, and any regulations or permits issued pursuant thereto or pursuant to subsection (d) of this section, shall have authority, in addition to any other authority provided by law relating to search and seizure, to execute any warrant to search for and seize any fish or wildlife or property or items taken, used, or possessed in connection with any violation of any such section, regulation, or permit with respect to which a civil penalty may be assessed pursuant to paragraph (1) of this subsection. Such fish, wildlife, property, or item so seized shall be held by any employee authorized by the Secretary or the Secretary of the Treasury pending disposition of proceedings by the Secretary involving the assessment of a civil penalty pursuant to paragraph (1) of this subsection;

except that the Secretary may, in lieu of holding such fish, wildlife, property, or item, permit such person to post a bond or other surety satisfactory to the Secretary. Upon the assessment of a civil penalty pursuant to paragraph (1) of this subsection for any nonwillful violation of any such section, regulation, or permit, such fish, wildlife, property, or item so seized may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate. The owner or consignee of any such fish, wildlife, property, or item so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasury. Whenever any fish or wildlife or property or item is seized pursuant to this subsection, the Secretary shall move to dispose of the civil penalty proceedings pursuant to paragraph (1) of this subsection as expeditiously as possible. If, with respect to any such fish, wildlife, property, or item so seized no action is commenced in any court of competent jurisdiction to obtain the forfeiture of such fish, wildlife, property, or item within thirty days following the disposition of proceedings involving the assessment of a civil penalty, such fish, wildlife, property, or item shall be immediately returned to the owner or the consignee in accordance with regulations promulgated by the Secretary.

(b) Any person who willfully violates any provision of sections 2 or 3 of this Act or any regulation or permit issued thereunder or any regulation issued under subsection (d) of this section shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both.

(c) The provisions of sections 2 and 3 of this Act and any regulations or permits issued pursuant thereto or pursuant to subsection (d) of this section shall be en-

forced by either the Secretary or the Secretary of the Treasury, or both such Secretaries. Either secretary may utilize, by agreement, the personnel, services, and facilities of any other Federal agency or any State agency. Any employee of the Department of the Interior or the Department of the Treasury authorized by the Secretary or the Secretary of the Treasury may, without a warrant, arrest any person who such employee has probable cause to believe is willfully violating, in his presence or view, any such section, or any regulation or permit issued thereunder, the penalty for which is provided under subsection (b) of this section, and may execute a warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of such sections, regulations or permits. An employee who has made an arrest of a person in connection with any such willful violation may search such person at the time of his arrest and seize any fish or wildlife or property or items taken, used, or possessed in connection with any such violation, or any such employee shall have authority, in addition to any other authority provided by law relating to search and seizure, to execute any warrant to search for and seize any such fish, wildlife, property, or item so taken, used, or posessed. Any fish or wildlife or property or item seized shall be held by any employee authorized by the Secretary or the Secretary of the Treasury or by a United States marshal pending disposition of the case by the court, commissioner, or magistrate, except that the Secretary may, in lieu thereof, permit such person to post a bond or other surety satisfactory to him. Upon conviction, any (1) fish or wildlife seized shall be forfeited to the Secretary for disposal by him in such manner as he deems appropriate, and (2) any other property or items seized may, in the discretion of the court, commissioner, or magistrate, be forfeited to the United States or otherwise disposed of. The owner or consignee

of any such fish, wildlife, property, or item so seized, shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasury. If no conviction results from any such alleged violation, such fish, wildlife, property or item so seized in connection therewith shall be immediately returned to the owner or consignee in accordance with regulations promulgated by the Secretary, unless the Secretary, within thirty days following the final disposition of the case involving such violation, commences proceedings under subsection (a) of this section.

(d) For the purposes of facilitating enforcement of sections 2 and 3 of this Act and reducing the costs thereof, the Secretary, with the approval of the Secretary of the Treasury, shall, after notice and an opportunity for a public hearing, from time to time designate, by regulation, any port or ports in the United States for the importation of fish and wildlife, other than shellfish and fishery products imported for commercial purposes, into the United States. The importation of such fish or wildlife into any port in the United States, except those so designated, shall be prohibited after the effective date of such designations; except that the Secretary, under such terms and conditions as he may prescribe, may permit importation at nondesignated ports for movement to designated ports of entry. Such regulations may provide other exceptions to such prohibition if the Secretary deems it appropriate and consistent with the purposes of this subsection.

(e) In carrying out the provisions of sections 2 through 5 of this Act, the Secretary may issue such regulations as may be appropriate.

SEC. 5. (a) In carrying out the provisions of sections 2 and 3 of this Act, the Secretary, through the Secretary of State, shall encourage foreign countries to provide pro-

tection to species and subspecies of fish or wildlife threatened with worldwide extinction, to take measures to prevent any fish or wildlife from becoming threatened with extinction, and shall cooperate with such countries in providing technical assistance in developing and carrying out programs to provide such protection, and shall, through the Secretary of State, encourage bilateral and multilateral agreements with such countries for the protection, conservation, and propagation of fish or wildlife. The Secretary shall also encourage persons, taking directly or indirectly fish or wildlife in foreign countries for importation into the United States for commercial or other purposes, to develop and carry out, with such assistance as he may provide under any authority available to him, conservation practices designed to enhance such fish or wildlife and their habitat. The Secretary of State, in consultation with the Secretary, shall take appropriate measures to encourage the development of adequate measures, including, if appropriate, international agreements, to prevent such fish or wildlife from becoming threatened with worldwide extinction.

(b) To assure the worldwide conservation of endangered species and to prevent competitive harm to affected United States industries, the Secretary, through the Secretary of State, shall seek the convening of an international ministerial meeting on fish and wildlife prior to June 30, 1971, and included in the business of that meeting shall be the signing of a binding international convention on the conservation of endangered species.

(c) There are authorized to be appropriated such sums, not to exceed $200,000, as may be necessary to carry out the provisions of subsection (b) of this section, such sums to remain available until expended.

SEC. 6. (a) The Secretary of Agriculture and the Secretary shall provide for appropriate coordination of the

administration of this Act and amendments made by this Act, with the administration of the animal quarantine laws (21 U.S.C. 101 et seq., 21 U.S.C. 111, 21 U.S.C. 134 et seq.) and the Tariff Act of 1930, as amended (19 U.S.C. 1306).

(b) Nothing in this Act, or any amendment made by this Act, shall be construed as superseding or limiting in any manner the functions of the Secretary of Agriculture under any other law relating to prohibited or restricted importations of animals and other articles and no proceeding or determination under this Act shall preclude any proceeding or be considered determinative of any issue of fact or law in any proceeding under any Act administered by the Secretary of Agriculture.

(c) Nothing in this Act, or any amendment made by this Act, shall be construed as superseding or limiting in any manner the functions and responsibilities of the Secretary of the Treasury under the Tariff Act of 1930, as amended, including, without limitation, section 527 of said Act (19 U.S.C. 1527) relating to the importation of wildlife taken, killed, possessed or exported to the United States in violation of the laws or regulations of a foreign country.

SEC. 7. (a) Section 43 of title 18, United States Code, is amended to read as follows:

"§43. Transportation of wildlife taken in violation of State, National, or foreign laws; receipt; making false records

"(a) Any person who——

"(1) delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped for commercial or noncommercial purposes or sells or causes to be sold

any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

"(2) delivers, carries, transports, or ships, by any means whatever, or causes to be delivered, carried, transported, or shipped for commercial or noncommercial purposes or sells or causes to be sold in interstate or foreign commerce any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country; or

"(b) Any person who—

"(1) sells or causes to be sold any products manufactured, made or processed from any wildlife taken, transported, or sold in any manner in violation of any Act of Congress or regulation issued thereunder, or

"(2) sells or causes to be sold in interstate or foreign commerce any products manufactured, made, or processed from any wildlife taken, transported, or sold in any manner in violation of any law or regulation of a State or a foreign country, or

"(3) having purchased or received wildlife imported from any foreign country or shipped, transported, or carried in interstate commerce, makes or causes to be made any false record, account, label, or identification thereof, or

"(4) receives, acquires, or purchases for commercial or noncommercial purposes any wildlife

"(A) taken, transported, or sold in violation of any law or regulation of any State or foreign

country and delivered, carried, transported, or shipped by any means or method in interstate or foreign commerce, or

"(B) taken, transported, or sold in violation of any Act of Congress or regulation issued thereunder, or

"(5) imports from Mexico to any State, or exports from any State to Mexico, any game mammal, dead or alive, or part or product thereof, except under permit or other authorization of the Secretary or, in accordance with any regulations prescribed by him, having due regard to the requirements of the Migratory Birds and Game Mammals Treaty with Mexico and the laws of the United States forbiding importation of certain live mammals injurious to agriculture and horticulture;

shall be subject to the penalties prescribed in subsections (c) and (d) of this section.

"(c)(1) Any person who knowingly violates, or who, in the exercise of due care, should know that he is violating, any provision of subsection (a) or (b) of this section may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed under this paragraph, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found or resides or transacts business to collect the penalty and such court

shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo.

"(2) Any employee authorized by the Secretary to enforce the provisions of this section, or any officer of the customs, shall have authority to execute any warrant to search for and seize any wildlife, product, property, or item used or possessed in violation of this section with respect to which a civil penalty may be assessed pursuant to paragraph (1) of this subsection. Such wildlife, product, property, or item so seized shall be held by such employee pending disposition of proceedings by the Secretary involving the assessment of a civil penalty pursuant to paragraph (1) of this subsection; except that the Secretary may, in lieu of holding such wildlife, product, property, or item, permit such person to post a bond or other surety satisfactory to the Secretary. Upon the assessment of a civil penalty pursuant to paragraph (1) of this subsection for any nonwillful violation of this section, such wildlife, product, property, or item so seized may be proceeded against in any court of competent jurisdiction and forfeited to the Secretary for disposition by him in such manner as he deems appropriate. The owner or consignee of any such wildlife, product, property, or item so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasury. Whenever any wildlife, product, property, or item is seized pursuant to this subsection, the Secretary shall move to dispose of the civil penalty proceedings pursuant to paragraph (1) of this subsection as expeditiously as possible. If, with respect to any such wildlife, product, property, or item so seized, no action is commenced in any court of com-

petent jurisdiction to obtain the forfeiture of such wildlife, product, property, or item within thirty days following the disposition of proceedings involving the assessment of a civil penalty, such wildlife, product, property, or item shall be immediately returned to the owner or the consignee in accordance with regulations promulgated by the Secretary.

"(d) Any person who knowingly and willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

"(e) Any wildlife or products thereof seized in connection with any knowing and willful violation of this section with respect to which a penalty may be imposed pursuant to subsection (d) shall, upon conviction of such violation, be forfeited to the Secretary to be disposed of by him in such manner as he deems appropriate. Any other property or item so seized may upon conviction, in the discretion of the court, be forfeited to the United States or otherwise disposed of. The owner or consignee of any such wildlife, product, property, or item so seized shall, as soon as practicable following such seizure, be notified of that fact in accordance with regulations established by the Secretary or the Secretary of the Treasury. If no conviction results from any such alleged violation, such wildlife, product, property or item so seized in connection therewith shall be immediately returned to the owner or consignee in accordance with regulations promulgated by the Secretary, unless the Secretary, within thirty days following the final disposition of the case involving such violation, commences proceedings under subsection (c) of this section.

"(f) For the purposes of this section, the term—

"(1) 'Secretary' means the Secretary of the Interior;

"(2) 'person' means any individual, firm, corporation, association, or partnership;

"(3) 'wildlife' means any wild mammal, wild bird, amphibian, reptile, mollusk, or crustacean, or any part, egg, or offspring thereof, or the dead body or parts thereof, but does not include migratory birds for which protection is afforded under the Migratory Bird Treaty Act, as amended;

"(4) 'State' means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam; and

"(5) 'taken' means captured, killed, collected, or otherwise possessed."

(b) Section 3054 of title 18 of the United States Code is amended to read as follows:

"§3054. Officers' powers involving animals and birds

"Any employee authorized by the Secretary of the Interior to enforce sections 42, 43, and 44 of this title, and any officer of the customs, may arrest any person who violates section 42 or 44, or who such employee or officer of the customs has probable cause to believe is knowingly and willfully violating section 43, in his presence or view, and may execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of said sections."

(c) Section 3112 of title 18 of the United States Code is amended to read as follows:

"§3112. Search warrants for seizure of animals, birds, or eggs

"Any employee authorized by the Secretary of the Interior to enforce sections 42, 43, and 44 of this title, and any officer of the customs, shall have authority to execute any warrant to search for and seize any wildlife, product, property, or item used or possessed in connection with a violation of section 42 or 44, or in connection with a knowing and willful violation of section 43, and any such wildlife, product, property, or item so seized shall be held by him or by the United States marshal pending disposition thereof by the court."

SEC. 8. (a) The first paragraph in section 44 of title 18, United States Code, is amended by deleting "wild animals or birds, or the dead bodies or parts thereof," and inserting "any wild mammal, wild bird, amphibian, or reptile, or any mollusk or crustacean, or the dead body or parts or eggs thereof."

(b) Section 44 of title 18, United States Code, is amended by adding at the end thereof a new paragraph to read as follows:

"In any case where the marking, labeling, or tagging of a package under this section indicating in any way the contents thereof would create a significant possibility of theft of the package or its contents, the Secretary of the Interior may, upon request of the owner thereof or his agent or by regulation, provide some other reasonable means of notifying appropriate authorities of the contents of such packages."

SEC. 9. (a) Section 2 of the Black Bass Act (44 Stat. 576), as amended (16 U. S. C. 852), is amended to read as follows:

"SEC. 2. It shall be unlawful for any person—

"(1) to deliver or receive for transportation, or to transport, by any means whatsoever, in inter-

state or foreign commerce, any black bass and other fish, if such person knows or in the exercise of due care should know that (A) such delivery or transportation is contrary to the law of the State or any foreign country from which such black bass or other fish is found or transported, or is contrary to other applicable law, or (B) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time, contrary to the law of the State or foreign country, in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported, or contrary to other applicable law;

"(2) to purchase or receive any such black bass or other fish, if such person knows, or in the exercise of due care should know, that such bass or fish has been transported in violation of the provisions of this Act;

"(3) receiving any shipment of black bass or other fish transported in interstate or foreign commerce to make any false record or render a false account of the contents of such shipment, if such person knows, or in the exercise of due care should know, that such record or account is false. For the purposes of this section, the provisions of section 10 of title 18, United States Code, shall apply to the term 'interstate or foreign commerce'."

(b) Section 3 of the Black Bass Act (46 Stat. 846), as amended (16 U. S. C. 852a), is amended by deleting the comma after "commerce" and inserting therein "or foreign commerce,".

(c) Section 6(a) of the Black Bass Act (46 Stat. 846), as amended (16 U. S. C. 852d(a)), is amended by adding a new sentence at the end thereof to read as follows: "The provisions of this section and any regulations issued thereunder shall be enforced by personnel of the Secretary of the Interior, and he may utilize by agreement, with or without reimbursement, personnel, services, and facilities of other Federal agencies."

(d) The first section of the Black Bass Act (46 Stat. 846), as amended (16 U. S. C. 851), is amended by inserting immediately before the period at the end thereof a comma and the following: "and the term 'State' means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Guam".

SEC. 10. The second paragraph of section 4 of the Migratory Bird Treaty Act, as amended (16 U. S. C. 705), is hereby repealed.

SEC. 11. The provisions of sections 1 through 10 of this Act shall be effective one hundred and eighty days after the date of enactment of this Act.

SEC. 12. (a) Section 1 of the Act of October 15, 1966 (80 Stat. 926; 16 U. S. C. 668aa), is amended by adding new subsection at the end thereof to read as follows:

"(d) For the purpose of sections 1 through 3 of this Act, the term 'fish and wildlife' means any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean."

(b) The last sentence of section 2(c) of the Act of October 15, 1966 (80 Stat. 926; 16 U. S. C. 668bb(c)), is amended by changing the "$750,000" to "$2,500,000".

(c) Section 2(d) of the Act of October 15, 1966 (80 Stat 926; 16 U. S. C. 668bb(d)), is amended by adding a new sentence at the end thereof to read as follows: "The Secretary is authorized to acquire by purchase, donation, exchange, or otherwise any privately owned land, water, or interests therein within the boundaries of any area administered by him, for the purpose of conserving, protecting, restoring, or propagating any selected species of native fish and wildlife that are threatened with extinction and each such acquisition shall be administered in accordance with the provisions of law applicable to such area, and there is authorized to be appropriated annually for fiscal years 1970, 1971, and 1972 not to exceed $1,000,000 to carry out the provisions of this sentence."

(d) The provisions of sections 1 through 5 of this Act and sections 1 through 3 of the Act of October 15, 1966 (80 Stat. 926; 16 U. S. C. 668aa-668cc), as amended by this section, shall hereinafter be cited as the "Endangered Species Conservation Act of 1969".

(e) The second sentence of section 1(a) of the Act of October 15, 1966 (80 Stat. 926; 16 U. S. C. 668aa(a)), is amended by changing the comma after the word "extinction" to a period and deleting the remainder of the sentence.

(f) The provisions of sections 4 and 5 of the Act of October 15, 1966 (80 Stat. 929; 16 U. S. C. 668dd-668ee), as amended, shall hereinafter be cited as the "National Wildlife Refuge System Administration Act of 1966".

Approved December 5, 1969.

Mason Act

FISH OR WILDLIFE—CERTAIN WILD ANIMALS—
PROHIBITION OF SALE

LAWS 1970—CHAPTER 1048

An Act to amend the agriculture and markets law, in relation to prohibiting the sale of certain wild animals or wild animal products.

Approved May 20, 1970, effective Sept. 1. 1970.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The agriculture and markets law is hereby amended by inserting therein a new section, to be section three hundred fifty-eight-a, to read as follows:

§358-a. Sale of certain wild animals or wild animal products prohibited

1. No part of the skin or body, whether raw or manufactured, of the following species of wild animals or the animal itself may be sold or offered for sale by any individual, firm, corporation, association or partnership within the State of New York after the effective date of this section:—Leopard (Panthera pardus), Snow Leopard (Uucia uncia), Clouded Leopard, (Neofelis nebulosa), Tiger (Panthera tigres), Cheetah (Acinoyx jubatus), Alligators, Caiman or Crocodile of the Order Crocodylia, Vicuna (Vicugna vicugna), Red Wolf (Canis niger), or Polar Bear (Thalarctos maritimus), nor after a period of twelve months from the effective date of this section, of the following species:—Mountain Lion, sometimes called Cougar (Felis Concolar), Jaguar (Panthera onca), ocelot (Felis Pardalis), or Margay (Felis Wiedii).

2. Any officer or agent authorized by the commissioner of the New York state conservation department, or any police officer of any municipality within the state of New York, shall have authority to execute any warrant to search for or seize any goods, merchandise or wildlife sold or offered for sale in violation of this section; such goods, merchandise, wildlife or property shall be held pending proceedings in any court of proper jurisdiction. Upon conviction, such seized goods, merchandise or wildlife shall be forfeited and, upon forfeiture, either offered to a recognized institution for scientific or educational purposes, or destroyed.

3. The commissioner of conservation may permit, under terms and conditions as he may prescribe, the importation of any species or subspecies of fish or wildlife listed in this section for zoological, educational, and scientific purposes, and for the propagation of such fish or wildlife in captivity for preservation purposes, unless such importation is prohibited by any federal law or regulation.

§2. This act shall take effect September first, nineteen hundred seventy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 270 **71 - 279**

PALLADIO, INC.,

Petitioner,

against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Proceedings Below	4
Reasons for Denying Certiorari	5
Conclusion	13

TABLE OF AUTHORITIES

CASES

A. E. Nettleton Co. v. *Diamond*, 264 N. E. 2d 118, 27 N. Y. 2d 182 (1970), aff'd *sub. nom. Reptile Products Association* v. *Diamond*, 401 U. S. 969	2, 5
Barrett v. *State of New York*, 116 N. E. 99, 220 N. Y. 423 (1917)	7
Bayside Fish Co. v. *Gentry*, 297 U. S. 422	7
Berman v. *Parker*, 348 U. S. 26	10
Breard v. *City of Alexandria*, 341 U. S. 622	9
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148	7
Corsa v. *Tawes*, 149 F. Supp. 771 (D. C. Md., 1957), aff'd 355 U. S. 37	12
Day-Brite Lighting, Inc. v. *Missouri*, 342 U. S. 421	9

PAGE

Ferguson v. *Skrupa*, 372 U. S. 726 12

Florida Lime & Avocado Growers v. *Paul*, 373 U. S. 132 .....6, 7, 9

Head v. *New Mexico Board*, 374 U. S. 424 8

Hines v. *Davidowitz*, 312 U. S. 52 9

Katzenbach v. *Morgan*, 384 U. S. 641 12

Nebbia v. *New York*, 291 U. S. 502 9

People ex rel. Silz v. *Hesterberg*, 211 U. S. 31 7

Reptile Products Assn. v. *Diamond*, 401 U. S. 969 ... 2, 5

Rice v. *Santa Fe Elevator Corp.*, 331 U. S. 218 8

Salasnek Fisheries, Inc. v. *Cashner*, 224 N. E. 2d 162, 9 Ohio App. 2d 233 (1967) 8

Staten Island Loaders v. *Waterfront Commission*, 117 F. Supp. 308 (D.C.N.Y. 1953), aff'd 347 U. S. 439, *reh. den.* 347 U. S. 994 10

Swift & Co. v. *Wickham*, 230 F. Supp. 398 (D.C.N.Y. 1964), cert. denied 385 U. S. 1036 7

Zschernig v. *Miller*, 389 U. S. 429 9

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution:

Art. I, Sec. 8, cl. 3..... 2
Art. II, Sec. 2 2
Art. VI, cl. 2 2
Art. XIV, Sec. 1 2

16 U.S.C. §§ 668aa, *et seq.* 3

Federal Endangered Species Conservation Act of 1969, P. L. 91-135, 83 Stat. 275 ..... 2, 3

PAGE

New York Agriculture and Markets Law § 358-a 2, 5

New York Conservation Law § 187 10

New York Conservation Law § 346 10

RULES AND REGULATIONS

50 CFR § 17.10 3

50 CFR § 17.11 3

50 CFR § 17.16 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The opinion of the District Court (MANSFIELD, D. J.) denying petitioner's motion for a preliminary injunction and the convening of a three-judge court is reported at 321 F. Supp. 630. The opinion of the Court of Appeals unanimously affirming the District Court is reported at 440 F. 2d 1319. Such opinions are reproduced at pp. A1 and A12, respectively, of the Appendix to the Petition for Writ of Certiorari.*

* References to the said appendix are designated "A—".

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Is there a substantial question whether Agriculture and Markets Law § 358-a operates in a field preempted by Congress, unconstitutionally interferes with the federal government's conduct of foreign affairs or unconstitutionally deprives petitioner of property without due process of law?

   The Court below held that there is not.

2. Is § 358-a a valid exercise of the State's police power?

   The Court below held that it is.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Constitution (Art. I, Sec. 8, Cl. 3, Art. II, Sec. 2, Art. VI, Cl. 2 and Art. XIV, Sec. 1), the New York Agriculture and Markets Law, and the Endangered Species Conservation Act (P.L. 91-135; 83 Stat. 275) are set forth in the petition, pp. 3-4 and A16-35.

Statement of the Case

This petition challenges the validity of the New York statute which was sustained in *A. E. Nettleton Co.* v. *Diamond,* 264 N.E. 2d 118, 27 N.Y.2d 182 (1970), app. dism. *sub nom. Reptile Products Assn.* v. *Diamond,* 401 U.S. 969, the Mason Act (§ 358-a of the Agriculture and Markets Law), which was enacted by the 1970 New York Legislature to deal with a problem of the most serious nature—

the decimation of certain already endangered species of animals, at such accelerated rates as to lead to their virtually certain extinction unless remedial steps be promptly taken. It is recognized today by the overwhelming preponderance of reputable scientific authority that the extinction of any entire species of mammal, reptile or bird may have severely detrimental ecological effects, altering the balance of nature and in many instances leading to an overabundance of insects and other pests which would otherwise be eaten by the eliminated species. It is recognized in addition that nature knows no political boundaries and that the effects of these changes on the environment may, and frequently do, transcend state and national boundary lines.

It was for these reasons that Federal legislation was enacted in 1966 (16 U.S.C. §§ 668aa, *et seq.*) in which Congress expressly found "that serious losses in [certain] species of native wild animals with educational, historical, recreational and scientific value have occurred and are occurring" and declared it to be Congressional policy to protect such endangered species.

Thereafter Congress extended this protection to world-wide species threatened with extinction in the Endangered Species Conservation Act of 1969 (P.L. 91-135; 83 Stat. 275) which forbids importation of species found by the Secretary of the Interior to be "threatened with world-wide extinction" as well as the interstate transportation of wildlife taken in violation of national, state or foreign laws. Pursuant to this Act, the Secretary of the Interior prepared an "endangered species list" of wildlife "deemed to be threatened with world-wide extinction" (50 CFR § 17.11). Importation of such species is forbidden (*id.* § 17.10).

Because conservation and specifically the regulation of fish and animals are traditionally the responsibility of the states under our federal system, and because Congress

plainly did not purport to preempt the field but rather devolved responsibility for preparing a list of threatened species with the Secretary of the Interior, leaving ample room for the operation of state laws, the New York Legislature, in recognition of New York's concern over the imminent extinction of these endangered species, enacted the challenged statute explicitly prohibiting the sale or offer for sale within New York of products made from the skins of certain specified animals threatened with extinction, including leopard, tiger and "alligators, caiman or crocodile of the Order Crocodylia."

Proceedings Below

The District Court (MANSFIELD, D.J.) found that the petitioner failed to raise a substantial federal question. It aptly noted (A1) that it is "now generally recognized that the destruction or disturbance of vital life cycles or the balance of a species of wildlife, even though initiated in one part of the world, may have a profound effect upon the health and welfare of people in other distant parts." The Court found no conflict between the Mason Act and federal legislation, holding that "[t]he state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection" (A6). The Court noted that although experts may disagree on the subject of which species may be endangered, the Legislature's well-documented finding in this regard may not be disturbed on judicial review (A8).

The Court considered petitioner's contention that it is possible for "persons engaged in the trade" to distinguish between the processed skins of the federally listed species and other species, pointed out that the expert testimony before the State was otherwise, and held that the Legislature could reasonably have adopted the latter view (A8). The Court added that even if petitioner's contention were

accepted, "it was appropriate for the legislature to protect all Crocodylia in order to prevent successive extermination of various species" (A8).

The Court found "ample evidence of vital non-aesthetic interests on the part of the state which justify its exercise of its broad police powers to discourage the extinction of foreign Crocodylia" (A9-10). It referred to an affidavit of William Conway, General Director of the New York Zoological Society and Park, to the effect that the extinction of commercial species would impair the opportunities for employment of New York workers who process pelts and that protection of the animals would give them time to repopulate (A10).

The Court found "no inconsistency or conflict between the recently enacted Federal Act * * * and the Mason Act" (A10) and pointed out that the Federal law "explicitly recognize[s] the role of the states." Finally, it rejected the claim that § 358-a violates the Due Process Clause (A11) and denied a motion for a preliminary injunction and a three-judge court since no substantial Federal question was presented.

The Court of Appeals affirmed in a *per curiam* opinion, relying substantially on the opinion of Judge MANSFIELD and on the decision of this Court in *Reptile Products Assn.* v. *Diamond*, 401 U.S. 969 (*infra*).

Reasons for Denying Certiorari

A.

Petitioner's attacks on this statute fall far short of overturning the powerful presumption of its constitutionality. The incredible claim that the decision of the New York Court of Appeals in *A. E. Nettleton Co.* v. *Diamond, supra*, app. dism. *sub nom. Reptile Products Assn.* v. *Diamond*, 401 U. S. 969, is incorrect and irrelevant

may be quickly disposed of. That case involved challenges to the same statute here involved on virtually identical grounds. New York's highest court rejected these claims and upheld the law on all counts, and this Court dismissed the appeal from that order. Petitioner's attempt to invent "crucial differences" between that case and this is ludicrous.

Similarly, petitioner's arguments on the factual questions of the degree of difficulty in distinguishing between the skins of endangered and non-endangered species and on the practices of the hide industry in regard to the utilization of various species should have been addressed to the Legislature. The Legislature held comprehensive hearings on this matter at which the testimony of distinguished biologists and zoologists was elicited that the enumerated species are threatened with extinction. Petitioner's disagreement with the legislative finding does not invalidate it. As the Court below held (A-7), "If the experts disagree—and apparently they do, * * * the legislature has the right to accept one line of authorities rather than another."

The contention that Congress has preempted the field of wildlife preservation is utterly insubstantial. Preemption occurs only where there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area [or] evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141. No such preemption could possibly be inferred from the pattern of federal and state regulation of wildlife conservation, a field historically reserved to the states.

Petitioner has completely failed to meet its burden of showing that compliance with both Federal and State regulations would be a physical impossibility for a person engaged in interstate commerce. The mere fact that the

Mason Law includes some species which are not on the current Federal Endangered Species List does not establish such impossibility (See *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 406 [D.C.N.Y. 1964], cert. den. 385 U. S. 1036; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 162).

The Court below correctly held that "[t]here is no inconsistency or conflict between the recently enacted Federal Endangered Species Conservation Act of 1969 * * * and the Mason Act" (A-10). The record "demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards." *Florida Lime Growers, supra,* at page 143. As the New York Court of Appeals held in rejecting this claim, "there has been no showing that compliance with both the Federal and State law is an impossiblity * * * [n]or has it been demonstrated that the Mason Law could not be enforced without impairing the effectiveness of the Federal Act," 264 N. E. 2d 118, 122.

Moreover, the preservation of wildlife is not a subject matter which by its very nature admits only of exclusive federal regulation. As the New York Court of Appeals noted (*id.*), "it is almost axiomatic that wildlife conservation has been a matter traditionally left to the states (See *Barrett* v. *New York* [116 N. E. 99, 100], 220 N. Y. 423)." It is a subject which neither inherently requires national supervision nor demands exclusive federal regulation in order to achieve uniformity vital to national interests. The Courts have repeatedly upheld state laws dealing with the possession and sale of game, hides and furs. See *Swift & Co.* v. *Wickham, supra; Bayside Fish Co.* v. *Gentry,* 297 U. S. 422 (upholding California's restrictions on processing of fish brought from other states); *People ex rel. Silz* v. *Hesterberg,* 211 U. S. 31 (sustaining a New York law prohibiting the possession of game within the state during the closed season, regardless of whether the animal was lawfully taken in a foreign state or country); *Salasnek*

Fisheries, Inc. v. *Cashner*, 224 N. E. 2d 162, 9 Ohio App. 2d 233 (1967) (upholding a statute forbidding the taking or possession of perch of less than a certain size, which applied to importation of perch caught outside the state). Indeed, the Federal Act itself specifically provides for the enforcement of state laws. The New York Court of Appeals correctly held that "[t]he Industry has not shown that wildlife conservation is a matter exclusively within the sphere of Federal competence." 264 N. E. 2d at 122.

Congress has indicated not the slightest intention that state action should be excluded in this field. Federal displacement of the "historic police powers of the State" should not be decreed "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218. Petitioner's insistence here that since the Federal Act is detailed and specific, it establishes the Congressional purpose to preempt State action in the area (Brief, p. 12) is completely belied by a reading of the statute. As this Court has held, "[t]he validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation * * *." *Head* v. *New Mexico Board*, 374 U. S. 424, 429. As New York's highest court pointed out, 264 N.E.2d at 122, "the Federal statute specifically provides for the enforcement of state laws such as the Mason Law."*

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* Section 7(a)(2) of the Act makes any person who "* * * sells or causes to be sold in interstate or foreign commerce *any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country*" or who (b)(2) "sells or causes to be sold in interstate or foreign commerce any products manufactured, made or processed from *any wildlife taken, transported or sold in any manner in violation of any law or regulation of a State or foreign country* * * *" subject to the enforcement provisions of the act, including a fine of up to $5,000 for each violation (emphasis supplied). Furthermore, the regulations promulgated by the Secretary of the Interior which preceded the Federal Endangered Species List provide that "[n]othing in this part * * * shall be construed to relieve any person from any provision of any other laws, rules or regulations of the States or the United States." 50 CFR § 17.16, 35 Fed. Reg. 8495.

Hines v. *Davidowitz*, 312 U. S. 52 and *Zschernig* v. *Miller*, 389 U. S. 429, are not helpful to petitioner. *Hines* v. *Davidowitz* involved a Pennsylvania statute requiring aliens to register and carry an identification card. The following year Congress passed the Federal Alien Registration Act. The Court held (p. 66) "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress * * * is supreme; and the law of the State * * * must yield to it.'" There can be no suggestion that the conservation of wildlife is so "intimately blended and intertwined" with the interests of the Federal government that Congressional action will be deemed preemptive of state power in this field. And *Zschernig* v. *Miller* is completely dissimilar to the case at bar since it was held to be an attempt by a state to involve itself in the conduct of foreign policy.

The language of the Federal Endangered Species Act is completely inconsistent with "an unambiguous congressional mandate" to preclude state action to regulate the sale of hides and skins. *Florida Lime Growers, supra,* at page 147. As the Court below held, "the Endangered Species Act invites state action" (A-11).

B.

The Mason Act is a valid exercise of the state's police power and is in no way violative of due process. As the Court below held (A-11), appellant "has no property right in the wildlife of foreign countries, and the mere loss of profits is not a basis for declaring the state laws unconstitutional." See *Nebbia* v. *New York*, 291 U. S. 502, 523; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424; *Breard* v. *City of Alexandria*, 341 U. S. 622, 632. The Constitution does not guarantee an absolute right to en-

gage in a business to the extent that it conflicts with the public interest. *Staten Island Loaders* v. *Waterfront Commission*, 117 F. Supp. 308, 311 (D.C.N.Y., 1953), aff'd 347 U. S. 439, reh. den. 347 U. S. 994. As this Court held in *Berman* v. *Parker*, 348 U. S. 26, 33, "The concept of the public welfare is broad and inclusive. • • • The values it represents are spiritual as well as physical, aesthetic as well as monetary."

New York clearly has a legitimate interest in taking steps to halt the extinction of the species enumerated in the Mason Law, regardless of whether or not they are native to the state.* As the Legislature stated in enacting § 187 of the Conservation Law (the Harris Act, a companion to the Mason Act, challenged and upheld in the District Court and not involved here):

> "The legislature of the state of New York hereby finds that the protection of endangered species of wildlife is a matter of general state concern. • • • The states • • • must assume the responsibility of restricting the transportation, possession and sale of these species within their respective jurisdictions to assure the continued survival of many of the nation's endangered

---

* There is specific historical precedent in New York for statutes prohibiting sale or possession for sale of hides or articles made from endangered animals. In 1909 the Legislature enacted what is now Conservation Law § 346. It prohibits the sale, or possession for sale, of "any part of the plumage, skin or body of any wild bird or unlisted domestic bird, whether taken within or without the state," with listed exceptions. "Wild bird" and "unlisted domestic bird" include "every kind of bird, regardless of origin," except for those expressly excluded (domestic fowl, pheasant, duck, pigeon and the like). That statute goes further than the law here involved. It makes possession of plumage in a store, warehouse or factory "presumptive evidence of illegal possession for sale." The section was enacted to protect from extinction the egret, whose plumage was then fashionable in ladies' hats. In six decades it has never been challenged, and in that period the egret has been saved from almost certain extinction.

> species of fish and wildlife. The legislature hereby finds that by eliminating the market for these species in New York State, the potential for their continued existence will be strengthened."

Animals are a resource of the entire world and know no political boundaries. As long as a market for their skins and hides existed in New York, a center of this industry, no amount of local regulation by the states and countries where the endangered species are found could effectively save them from extinction, since such laws are rendered unenforceable by the vast expanses of territory and scarcity of personnel involved, and by the extraordinary value of the hides to gangs of poachers. Thus the Mason Act is the only practical alternative to a confession of impotence to deal with this situation.

There is no support for petitioner's claim that the Federal Endangered Species List is entirely dispositive of the question of which species of animal are threatened with extinction, and it is simply untrue that the Secretary of the Interior has found "5 species and one subspecies [of the order crocodylia] * * * to be endangered" and that the remaining species and subspecies are in abundant supply (Brief, p. 6). Neither the language of the Federal Act nor that of the Secretary of the Interior indicate that his list is final and definitive. As the District Court held, "[t]he state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection. We cannot overrule the legislature for being cautious. Extinct animals, like lost time, can never be brought back" (A-6).

The protection of animals facing the threat of extinction was plainly a valid subject for legislative consideration. "The State is interested not merely in the preservation of

specimens for museums but in conserving and perpetuating a constant supply." *Corsa* v. *Tawes,* 149 F. Supp. 771, 774 (D. C. Md. 1957), aff'd 355 U. S. 37. In that case, sustaining Maryland's restrictions on taking of ocean fish beyond its waters, the three-judge Federal court held (p. 775):

> "Where should these conflicts be resolved? Certainly the courts are not an appropriate forum. These matters are peculiarly legislative in character, and not within the judicial sphere."

Here, the Legislature held lengthy hearings at which testimony of distinguished biologists and zoologists was elicited that the enumerated species are threatened with extinction. These legislative findings are not properly the subject of judicial review. See *Katzenbach* v. *Morgan,* 384 U. S. 641, 653:

> "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the congress might resolve the conflict as it did."

It is basic that the wisdom of, or necessity for, a statute is beyond the scope of judicial review. *Ferguson* v. *Skrupa,* 372 U. S. 726, 730.

C.

The statute in no way interferes with the federal government's right to conduct foreign affairs, nor does it hinder the "international cooperation" referred to in the federal act. The Secretary of State retains full authority to enter into treaties or conservation agreements with foreign governments. Even if hypothetically such a treaty were to deal with the *importation* into the United States of a species listed in the Mason Act, no conflict could conceivably arise as to *sales* within the state. In any event, there is no such present issue.

Petitioner's challenges to this statute were properly regarded as insubstantial.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should in all respects be denied.

Dated: New York, New York, October 15, 1971.

Respectfully submitted,

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No. 71-279

PALLADIO, INC.,

Petitioner,

against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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The basic question remains unanswered; why is this petitioner, whose business life is at stake, not entitled to a trial on the merits? We suggest that the respondent, in an effort to deny that which is afforded the worst felon, has erred in its statement of the facts and misconceived the applicable principles of law.

Respondent's statement that the facts and issues of law herein are "virtually identical" with those before the Court in *A. E. Nettleton Co.* v. *Diamond,* app. dism. sub-nom *Reptile Products Assoc.* v. *Diamond,* 401 U. S. 969

(*Nettleton* hereinafter) is erroneous in the following respects:

Contrary to the facts at Bar, there is not a word in *Nettleton* challenging the basis of respondent's contention,* and the fulcrum of the lower court's decisions, that commerce in the 22 species of foreign Crocodylia "in abundant supply" must be prohibited because their skins "are indistinguishable" from the skins of the 4 species considered endangered (75A).

The record at bar contains verified statements from knowledgeable individuals that the foregoing conclusion is completely erroneous and that, on the contrary, the processed skins of the different species and sub-species are readily distinguishable and must be readily distinguishable, citing as proof thereof, the enormous disparity in the prices of the skins of the different species.

It is unquestionable, we suggest, that the petitioner's challenge to the lower Court's holding that the skins of the species cannot be distinguished is a basic issue which can be resolved only by a trial upon the merits before a 3 judge Court.

We need hardly belabor the concept that if the 3 judge Court find, as a fact, that the skins of the different species are distinguishable, then the Mason Act is unconstitutional because it is too broad.

> *Weaver* v. *Palmer*, 270 U. S. 402;
> *Peo. ex rel. Silz* v. *Hesterberg*, 211 U. S. 31 at 38.

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* The contention was advanced by Dr. King in August, 1970 (66a-67a) and adopted by all the lower courts (75a). However, we have just learned that Dr. King, at the request of a grand jury in the Southern District of New York, has unquestionably examined the inventories of various skin dealers to determine whether their inventories contained the skins of any species of Crocodylia contained on the Federal Foreign Endangered Species List. Evidently, Dr. King has learned how to distinguish the skins of the several species, and thus upheld petitioner's statement that the skins are distinguishable.

Similarly respondent's second, and last, factual contention that the leather industry engages in rolling exterminations of the many species of Crocodylia was likewise left unanswered, let alone challenged in *Nettleton.* On the other hand, in the case at Bar, the contention was exposed as erroneous and flatly contradicted under oath by knowledgeable individuals.

It is respectfully suggested that these 2 issues are issues of fact, the resolvement of which would determine whether or not the Mason Act violated the constitution. Is not, therefore, the petitioner entitled to an opportunity to prove at a trial, that the processed skins of the 22 species of Crocodylia in "abundant supply" are distinguishable and that the industry has not engaged in rolling exterminations of any of the species?

2. Respondent's repeated statements and suggestions that the petitioner's sole recourse is to the Legislature, whose findings are binding upon the Courts, is a complete misconception of the law, repeatedly enunciated by this Court. Indeed, in citing *Peo. ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, the respondent has cited one of the leading authorities rejecting its own argument. In the cited case Mr. Justice Day, speaking for an unanimous Court, enunciated the principle so succinctly at 211 U. S. 38, 39 that its verbatim quotation is in order.

> "That the Legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. *Lawton* v. *Steele,* 152 U. S. 137, 37 L.

ed. 388, 14 Sup. Ct. Rep. 499; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Dobbins* v *Los Angeles*, 195 U. S. 236, 49 L. ed. 178, 25 Sup. Ct. Rep. 18."

Incidentally, we disregard for the nonce the conceded fact that the New York Legislature did not even hold hearings, let alone make findings in connection with the Mason Act. Even if it had, it is of course clear that its findings are not binding upon the courts which alone bear the constitutional responsibility for protecting citizens from "unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business."

3. The respondent's attempt to negate the petitioner's charge that the Mason Act is an extension of the police power far beyond that ever even considered, let alone upheld by any Court, is revealed to be spurious. In support of its argument that the courts have constitutionally upheld a state's law controlling possession and use of out-of-state wild life in the state, respondent has cited 4 cases. In every one of those cases, the state law was upheld solely upon the ground that because of the identity of the out-of-state wild life with that of the state, the law was the only method by which the state could protect its own indigenous wild life. Indeed, the basic concept was clearly expressed in another of one of the 4 cases cited by respondent, namely *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422. In *Bayside* this Court upheld a California law controlling the importation of herring into California. But Mr. Justice Sutherland, speaking for a unanimous Court, made clear that it did so solely on the ground that the law's purpose was to conserve the fish supply of the state, in these words at 297 U. S. 427, 428

> "These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state . . ."

The respondents have wholly failed to refer to a single case upholding a state's right to limit or control the importation into the state of foreign wild life completely unrelated to any species of wild life indigenous to the state. Since, in the memory of man no species of Crocodylia has been indigenous to the State of New York, and none of the species of foreign Crocodylia at Bar are closer to the borders of New York than 5,000 miles, we respectfully suggest that there is no nexus between such foreign, distantly located wild-life and any species of wild-life indigenous to New York, to support New York's right to preclude the possession or sale thereof in New York.

4. The respondent's attempt to distinguish the holdings in *Hines* v. *Davidowitz,* 312 U. S. 52 and *Zechernig* v. *Miller,* 389 U. S. 429 are so puerile as to establish their distinct, direct applicability to the case at Bar.

It is manifest, we submit, that the Mason Act's interference, with the Federal Government's exclusive right to conduct foreign affairs, is at least as onerous as the Pennsylvania law, considered in the *Davidowitz* and the Oregon law considered in *Zschernig.* Indeed, we suggest that the Mason Act's intervention in foreign affairs is more direct than the intrusion of either Pennsylvania's laws or of Oregon's law because at Bar there is an immensely detailed Federal Statute directing the Secretary of the Interior and the Secretary of State to enter into bilateral and multi-lateral agreements with foreign countries to control the harvesting and commerce in species of foreign wild life considered to be endangered.

That the upholding of the Mason Act is an obvious intrusion in the Federal Government's exclusive right to

conduct foreign affairs is perhaps of less importance than the drastic consequences certain to flow therefrom.

For example, there would then appear to be no restriction upon a state prohibiting the importation and sale of a foreign country's fauna or flora, even despite the existence of a treaty,* upon that state's "finding" that the raising, growing or harvesting thereof represented an over-use (or under-use) of the foreign country's natural assets and thus a threat to the world's ecology.

The principle could be extended to the foreign country's manufactured products by similarly attacking the mining, raising, growing or harvesting of the raw materials.

Aside from the hodge-podge resulting from each state making its own, different "findings" this is a luxury this country can ill afford, especially now with its emissaries in foreign countries for the sole purpose of stimulating international trade.

CONCLUSION

The petition for a writ of certiorari should in all respects be granted.

Respectfully submitted,

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* The respondent makes this very contention (Answering Brief, p. 12, sub-head C).